

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1339 OF 2005
IN
SUIT NO.1234 OF 2005

ITC Limited ... PLAINTIFF

V/s.

Raj Agro Products Pvt. Ltd. ... DEFENDANTS

Mr. Rahul Chitnis with Mr. P.P. Paul for the plaintiff
None for the defendants.

CORAM : ANOOP V. MOHTA, J.
DATED : 21st April, 2006

P.C.

1) The plaintiff's word marks/labels "SUNFEAST" and/or "SUNFEAST GLUCOSE", have been conceived in about 30th June, 2005.

2) The plaintiffs have been carrying on the business of manufacturing and marketing biscuits of various types since long.

3) The plaintiffs have created artistic work in respect of the biscuits through one Mrs. Zoya Riyas who was at the relevant time in the employment of a company.

4) The artistic work was assigned by the company

in favour of the plaintiff by executing a deed of assignment dated 30th June, 2002. In the result the entire copyright in question has been, assigned in favour of the plaintiffs. The company has also by a letter dated 30th June, 2003 gave "no objection" to the plaintiffs for getting the copyright in respect of the said artistic work to be registered. The plaintiffs have been using said artistic work as a label marks and selling the biscuits under the words mark in question, on extensive scale.

5) The plaintiffs have spent huge amount by way of publicity and advertisement and gained the popularity of their word marks and label marks. The same have been marked extensively by the plaintiffs. The said word marks and labels therefore are closely associated by the traders and members of the public exclusively with the plaintiffs.

6) The plaintiffs have made an application for registration of the trade marks consisting of word marks as also the label marks containing the words in question having distinctive features.

7) (a) The plaintiffs have filed a suit bearing

No. 935 of 2005 for an order and injunction restraining the defendants from manufacturing and/or selling the biscuits under the brand name SUNLITE CHOCOLATE CREAM, SUNLITE ORANGE CREAM SUNLITE PINEAPPLE CREAM AND SUNLITE MANGO CREAM and further from encroaching plaintiffs' copyright label bearing plaintiffs word. By order dated 28th March, 2005 the Notice of Motion No. 925 of 2005 this Court has granted ad-interim relief in terms of prayer clauses (a) & (b) and restrained the defendants from using said words and labels. The Receiver has been appointed under Order 40 Rule 1 of the Civil Procedure Code (CPC). The Court Receiver seized a sizeable quantity of the infringed products.

. (b) During the implementation of the said order, the plaintiffs came to know that the defendants have started manufacturing and selling the biscuits under the trade mark/labels "SUNLITE CHOCOLATE CREAM, SUNLINE ORANGE CREAM SUNLITE PINEAPPLE CREAM AND SUNLINE MANGO CREAM" which were deceptively similar to the plaintiffs' labels/marks. This is amounting to an infringement of the plaintiffs' copyright in the original artistic work.

8) The plaintiffs, have also filed a complaint u/s 63 of the Copyright Act, 1957 and u/s 420 read with Section 120 B of the Indian Penal Code at Hyderabad, on 01-04-2005. A huge quantity of the defendants' products were seized during the raids. The defendants have copied the labels which are close and distinctively similar and also adopted the word mark SUNLITE CHOCOLATE CREAM, SUNLINE ORANGE CREAM SUNLITE PINEAPPLE CREAM AND SUNLINE MANGO CREAM which are deceptively similar to the plaintiffs' word marks SUNFEAST and/or SUNFEAST GLUCOSE and creating confusion amongst people and traders and members of the public. The defendants have adopted the letter and style, the entire colour combination scheme, get up and the layout of the plaintiffs' label marks. The defendants have also copied plaintiffs' artistic work.

9) Both these goods are ordinarily available across the counters. They are being purchased by every strata of the society. The intention of the defendant is therefore clear to deceive and cause confusion and to sell its products in the same market and to exploit the already established popularity and market of the plaintiffs. The defendants are therefore passing off or enabling others to pass off

the defendants goods as and for the goods of the plaintiffs.

10) The plaintiffs carry on business in Mumbai. The cause of action is continuous one. The present suit is within limitation. The leave under clause XIV of the Letters Patent by combining the cause of action in respect of passing off with the cause of action of infringement of copyright have been obtained.

11) There is no reply filed by the defendants. All above averments remained uncontroverted. In Croom's Trade Mark Applications [2005] R.P.C. 2 based on a judgment under Trade Marks Act, 1994 (English Law), it has been observed as under :-

"I understand the correct approach to be as follows. when rival claims are raised with regard to the right to use a trade mark, the rights of the rival claimants fall to be resolved on the basis that within the area of conflict :

- (a) the senior user prevails over the junior user;
- (b) the junior user cannot deny the senior user's

rights;

(c) the senior user can challenge the junior user unless and until it is inequitable for him to do so.

In the present case, as observed above, there is no rival claim raised of any kind with regard to the use of the trade mark in question.

12) The similarity tests and the likelihood of confusion are also relevant factors which need to be taken into account in the facts and circumstances of the case. In credit master trade mark [2005] R.P.C. 21 (C.D.) based on a well known case of Sabekl BV V/s. Puma AG [1998] R.P.C. 199 at pg. 224 observed as under :-

"The global appreciation of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. ... The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details."

13) All ingredients to grant an interim relief and injunction have been made out. The equity and balance of convenience also lies in favour of the plaintiff. The ad-interim order has been in operation since 2nd May, 2005.

14) Apart from the above, I have gone through the averments made in the plaint as well as in the affidavit in support of Notice of Motion and the exhibits annexed to the plaint. The above necessary materials are sufficient at this stage to confirm the ad-interim order as granted.

15) In view of above undisputed position on record, I am inclined to confirm prayer clause (a) as granted by this Court.

Clause (a) :- That pending the hearing and final disposal of the suit, the Defendants by themselves, their servants and agents be restrained by an order and injunction of this Hon'ble Court from any manner using and/or exposing or offering for sale any goods bearing the impugned labels, using Exhibit-M to the Plaint or any colourable imitation or substantial reproduction of the Plaintiff's artistic works, being

Exhibits C and H-2 to H-10 to the Plaintiff so as to infringe the plaintiff's copyright in the original artistic work, Exhibits C and H-2 to H-10 to the Plaintiff.

16) The Notice of Motion is partly allowed accordingly with liberty to take up appropriate proceedings, if necessary, as far as other prayers are concerned. No costs.

[ANOO V. MOHTA, J.]